

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AARON ROME,

Plaintiff,

V.

DANIEL M. LIBBY, HCC LIFE INSURANCE COMPANY, HCC SPECIALTY UNDERWRITERS, INC., THE NATIONAL HOCKEY LEAGUE, THE NHL PLAYERS' HEALTH AND BENEFITS FUND, THE BOARD OF TRUSTEES, NATIONAL HOCKEY LEAGUE PLAYERS' HEALTH FUND A/K/A THE BOARD OF TRUSTEES OF THE NHL PLAYERS' HEALTH AND BENEFITS FUND, and CRAIG HARNETT,

Defendants.

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C.A. No.

**NOTICE OF REMOVAL OF CIVIL  
ACTION TO UNITED STATES  
DISTRICT COURT**

## NOTICE OF REMOVAL

Defendant, HCC LIFE INSURANCE COMPANY, (“HCC Life”) for its Notice of Removal states:

**STATE COURT ACTION**

1. On or about August 3, 2016, Plaintiff filed the action titled *AARON ROME, Plaintiff vs. DANIEL M. LIBBY et al., Defendants*; Case No. DC-16-09393 (“the Complaint”) in the 44th Judicial District Court of Dallas County, Texas.

2. A true and correct copy of Plaintiff's Complaint is attached hereto as **Exhibit A1**.

3. This matter is a dispute regarding HCC Life’s denial of insurance benefits under a group disability policy. (*See* Plaintiff’s Complaint, IV. BACKGROUND, p. 4). “[T]here is an insurance policy that provides coverage for Rome's compensable and valid claim.” (*See* Plaintiff’s Complaint, p. 7). “The conduct of HCC Life, as the insurer, is a breach of contract by

refusing to pay Rome's covered disability claim.” (*See* Plaintiff’s Complaint, p. 9). The Complaint does not allege or make any claim related to named defendants DANIEL M. LIBBY, HCC SPECIALTY UNDERWRITERS, INC., THE NATIONAL HOCKEY LEAGUE, THE NHL PLAYERS’ HEALTH AND BENEFITS FUND, THE BOARD OF TRUSTEES, NATIONAL HOCKEY LEAGUE PLAYERS’ HEALTH FUND A/K/A THE BOARD OF TRUSTEES OF THE NHL PLAYERS’ HEALTH AND BENEFITS FUND, and/or CRAIG HARNETT, and/or they are sham defendants and/or improperly joined parties.

4. Plaintiff has alleged claims for relief for “V. Request for Declaratory Relief, VI. Breach of Contract, VII. Violations of the Texas Prompt Pay Statute, VIII. Violations of Texas Insurance Code Section 541.001, ET SEQ., and IX. Conspiracy to Violate Sections 541.060 and 541.061 of the Texas Insurance Code.”

5. Plaintiff’s claim is governed in full by the Employee Retirement Income Security Act of 1974 (“ERISA”).

**Timeliness and Technical Requirements of Removal**

6. HCC Life and HCC Specialty Underwriters, Inc. were served with summons and complaint on August 10, 2016. The NHL Players’ Health and Benefits Fund was served on August 16, 2016. Service was attempted on Daniel M. Libby on August 25, 2016. No other defendants have been served.

7. This removal is timely under 28 U.S.C. § 1446 in that it is filed less than 30 days after service of the summons and complaint. Additionally, this removal is timely filed within one year of the commencement of the action. *See* 28 U.S.C. § 1446(c)(1).

8. Written notice of the filing of this Notice of Removal of Action has been given to all adverse parties and a copy is concurrently being filed in the state court matter.

9. HCC Life, HCC Specialty Underwriters, Inc., and the NHL Players' Health and Benefits Fund are the only Defendants that have been served in this matter; and service has been attempted on Daniel M. Libby. No other defendant has been served. HCC Specialty Underwriters, Inc., the NHL Players' Health and Benefits Fund, and Daniel M. Libby are filing Certificates of Consent to removal of this action to federal court.

#### **Federal Question Jurisdiction**

10. Plaintiff has alleged a claim against HCC Life for disability benefits and other alleged monetary damages from an employee benefit plan. Plaintiff alleges that "he was insured by a policy of insurance issued by HCC Life" (*see* Plaintiff's Complaint, p. 4) and attached to the Complaint as Exhibits 1 and 2 are the Health and Benefits Plan Highlights Summary – Active Players, which confirm that the disability benefits were provided to Plaintiff by his former employer. Additionally, Plaintiff refers to a Form 5500 filed regarding the insurance policy. (*See* Plaintiff's Complaint, p. 7). A Form 5500 is a federal filing regarding an employee welfare benefits plan governed by ERISA.

11. This Court has original jurisdiction over the subject matter of this civil action pursuant to ERISA, 29 U.S.C. § 1001, *et seq.* The Policy is part of an employee welfare benefit plan (the "Plan") within the meaning of 29 U.S.C. Section 1002(1). The Plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"). The enforcement of rights and claims for benefits under the Plan are governed exclusively by federal law under ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). Removal of such cases to federal court is proper. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987).

12. The United States District Court for the Northern District of Texas is a proper venue in that the action being removed was filed in the District Court for Dallas County, Texas. *See* 28 U.S.C. § 1446(a).

13. Plaintiff seeks to recover benefits and to enforce rights under the Plan.

14. As an insured under the Plan, Plaintiff was a “participant” of the Plan as defined by ERISA, 29 U.S.C. § 1002(7).

15. Because this action involves a claim to recover benefits and to enforce rights under an employee welfare benefit plan, it is governed by ERISA. Under ERISA, this Court has concurrent original jurisdiction pursuant to the provisions of 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Removal is effectuated pursuant to the provisions of 28 U.S.C. § 1441 and is timely under the provisions of 28 U.S.C. § 1446(b) in that less than thirty (30) days have elapsed since Defendant was served with the Complaint. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999) (thirty day period for removal is triggered by “simultaneous service of the summons and complaint or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service”).

16. 29 U.S.C. § 1002(1), states “[t]he terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of . . . disability. . .” Since Plaintiff alleges that he is covered by a disability policy issued to his employer it is an “employee welfare benefit plan” which is covered by ERISA.

17. The Plan is an employee welfare benefit plan as defined in 29 U.S.C. § 1002(1). There are five elements that are required for a plan to constitute an employee welfare benefit plan under Section 1002(1):

(1) A ‘plan, fund or program’ (2) established or maintained (3) by an employer or by an employee organization, or by both (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries.

*Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc) and accepted by the Fifth Circuit in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir.1990).

In *Donovan*, the Court stated:

[A] plan, fund or program [exists] under ERISA . . . if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.

*Id.* at 1373. The Plan clearly fits within this definition of a Section 1002(1) “plan, fund or program.” The Plan was/is established and maintained by the NHL and the NHL Players Association (“NHLPA”) pursuant to collective bargaining agreements by obtaining the group disability policy from HCC Life to provide benefits to eligible hockey players who participate in the Plan. The intended benefits are the benefits provided under the Plan. The procedures for receiving benefits are those set out in the Policy.

18. There is no requirement that the NHL and/or NHLPA play any role in administering the Plan in order for it to be deemed an ERISA governed employee welfare benefit plan. Thus, a commercially purchased insurance policy under which the procedures for receiving benefits are all dictated by the insurance carrier can constitute a plan for ERISA purposes. *See Donovan*, 688 F.2d at 1374. Indeed, the Section 1002(1) definition expressly

contemplates and encompasses benefits “provid[ed] . . . through the purchase of insurance.” Accordingly, there can be no doubt that the insurance policy at issue qualifies as part of a “plan, fund or program,” as that term is used in Section 1002(1).

19. The Section 1002(1) requirement that an ERISA employee welfare benefit plan be “established or maintained by [the] employer” is also satisfied in this case. The NHL and the NHLPA provided the Plan through the purchase of a disability policy and made the coverage available to hockey players, including the Plaintiff. Thus, it is clear that the NHL and NHLPA both established and maintained the Plan as required by Section 1002(1). *See Donovan*, 688 F.2d at 1375. This is evidenced further by the fact that among the Defendants are the NHL Players’ Health and Benefits Fund and its Board of Trustees. Accordingly, the Plan constitutes part of an employee welfare benefit plan governed by ERISA.

20. ERISA defines a “beneficiary” as follows:

[A] person designated by a participant, or by the terms of an employee benefit plan, who is or has become entitled to benefits thereunder.

29 U.S.C. § 1002(8). Here, Plaintiff claims to be a beneficiary as defined by ERISA.

21. In this action, Plaintiff seeks a determination regarding entitlement to benefits under the Plan, which constitutes part of an employee welfare benefit plan. Under the United States Supreme Court decisions in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the allegations in the Complaint are sufficient to bring this case within the provisions of ERISA which provides the exclusive remedy for actions within its scope and preempts all other remedies. *See also* 29 U.S.C. § 1144.

22. The District Courts of the United States have concurrent original jurisdiction over actions brought to recover benefits and enforce rights under employee welfare benefit plans, and

federal law under ERISA controls. 29 U.S.C. § 1132(e)(1); *Pilot Life*, 481 U.S. at 55. Removal of such cases to federal court is, therefore, proper. *Metropolitan Life*, 481 U.S. at 67.

23. ERISA's preemptive power is so strong that all claims that relate to employee welfare benefit plans are automatically recharacterized as federal in nature and are, therefore, removable to United States District Courts. *Id.* Indeed, the Supreme Court's decision in *Metropolitan Life* has specifically abrogated, in ERISA cases, the principle that in determining removal jurisdiction, the Court will consider only a plaintiff's well-pleaded complaint. *Id.*

#### **Removal Based On Diversity Of Citizenship**

24. This Court also has jurisdiction over this action under the provisions of 28 U.S.C., § 1332, and is one which may be removed pursuant to the provisions of 28 U.S.C., § 1441(b) in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, as explained more fully below.

25. Plaintiff is, and was at all times relevant, a citizen of Canada.

26. HCC Life is, and at the time of the filing of this action was, a company incorporated in the State of Indiana and is domiciled and has its principal place of business in Georgia. Accordingly, there is diversity of citizenship between Plaintiff and HCC Life.

27. This Court's jurisdictional minimum of an amount in controversy in excess of \$75,000 is satisfied because Plaintiff seeks to recover the benefits under the Plan in the amount of \$840,000.00.

28. The citizenship of DANIEL M. LIBBY, HCC SPECIALTY UNDERWRITERS, INC., THE NATIONAL HOCKEY LEAGUE, THE NHL PLAYERS' HEALTH AND BENEFITS FUND, THE BOARD OF TRUSTEES, NATIONAL HOCKEY LEAGUE PLAYERS' HEALTH FUND A/K/A THE BOARD OF TRUSTEES OF THE NHL PLAYERS'

HEALTH AND BENEFITS FUND, and/or CRAIG HARNETT (collectively referred to as the “Improperly Joined Defendants”) should be disregarded for the purposes of this removal because they are improperly joined parties.

29. This matter arises, as alleged by Plaintiff, out of “[t]he conduct of HCC Life, as the insurer, [which] is a breach of contract by refusing to pay Rome's covered disability claim.” (See Plaintiff's Complaint, p. 9). All charging allegations in the complaint are asserted against HCC Life, the insurer of the group Disability Plan and sole entity obligated to process and pay Plan benefits. Moreover the Complaint includes no viable charging allegations against the Improperly Joined Defendants. The Complaint acknowledges that HCC Life is the only possible party liable under the contract of insurance (“HCC Life, as the insurer, . . . [breached the] contract by refusing to pay Rome's covered disability claim.” See Plaintiff's Complaint, p. 9).

30. Normally, complete diversity of citizens is necessary for a federal court to exercise diversity subject matter jurisdiction, meaning the Plaintiff cannot be a citizen of the same state as any other defendant. However, the improper joinder doctrine provides that diversity jurisdiction is not automatically defeated by naming nondiverse defendants. To prove allegation of fraudulent joinder, the removing party “must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.” *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816-817 (5th Cir. 1993). When determining removal jurisdiction, the court need not determine whether the claim has been stated against a nondiverse defendant under a legal theory not alleged in state court complaint. *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 260-262 (5th Cir. 1995). When there is no evidence, as determined by the Court, to support a claim against a non-diverse party, there is “no possibility



of recovery,” and the non-diverse party was “fraudulently joined.” *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 101 (5th Cir. 1990). When a nondiverse party lacks a duty to the plaintiff “absolutely no possibility exists that the plaintiffs can state a claim against” the nondiverse party. “Accordingly, there is complete diversity in this case and the district court had subject matter jurisdiction under 28 U.S.C. § 1332(a).” *Rodriguez v. Sabatino*, 120 F.3d 589, 592 (5th Cir. 1997).

31. The Improperly Joined Defendants were only named in an effort to avoid diversity jurisdiction and, thus, are improperly joined. There is no possibility that the Plaintiff would be able to establish a cause of action against the Improperly Joined Defendants in state court because Plaintiff’s allegations establish that the Improperly Joined Defendants cannot be liable for Plaintiff’s claim of breach of insurance contract, or any other claim relevant to the asserted facts because the contract of insurance was issued by HCC Life. HCC Life is the only entity that can possibly be liable for Plaintiff’s allegation of breach of the insurance contract issued by HCC Life.

32. Based on the above, diversity jurisdiction exists because this is a civil action between citizens of different states and Plaintiff has demanded damages in excess of \$75,000. 28 U.S.C. § 1332(a).

### **Removal Jurisdiction**

33. Because this matter is governed by ERISA, this Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331. Furthermore, because the citizenship of the parties is diverse and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs, the Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332.

34. Accordingly, HCC Life asks that the United States District Court for the Northern District of Texas issue such orders and process as are necessary to preserve its jurisdiction over this matter.

**Compliance with local Rules**

1. Pursuant to Local Rule 81.1(a)(4)(A), an index of all documents that clearly identifies each document and indicates the date the document was filed in state court is attached hereto as **Exhibit A**.

2. Pursuant to Local Rule 81.1(a)(4)(B), a copy of the docket sheet in the state court action is attached hereto as **Exhibit B**.

3. Pursuant to Local Rule 81.1(a)(4)(C), attached hereto as **Exhibits A1-A14** are copies of each document filed in the state court action.

4. Pursuant to Local Rule 81.1(a)(4)(D), attached hereto as **Exhibit C** is a separately signed Certificate of Interested Persons.

**Prayer**

WHEREFORE, HCC Life requests that, on this 26th day of August, 2016, this action be removed from the 44<sup>th</sup> Judicial District Court of Dallas County, Texas to this Court, and that this Court accept and assume subject matter jurisdiction.

August 26, 2016

Respectfully submitted,

/s/ Mike Birrer

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**ATTORNEYS FOR DEFENDANT HCC LIFE  
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**CERTIFICATE OF SERVICE**

On August 26, 2016, I electronically filed the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. Service on all attorneys of record who are Filing Users will be automatically accomplished through notice of electronic filing.

/s/ Mike Birrer